

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Identity Cards Bill

Liberty's briefing for Second Reading in the House of Commons

June 2005

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

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“Instead of wasting hundreds of millions of pounds on compulsory ID cards as the Tory right demand, let that money provide thousands more police officers on the beat in our local communities”

Tony Blair, Party Leader, Labour Conference, Brighton 1995

Summary

Liberty does not accept that a national compulsory ID card scheme is justified.

Our principle concerns

- They will fundamentally change the relationship between individual and state.
- They will have a detrimental impact on race relations and will adversely affect vulnerable groups in society.
- They will intrude on privacy the amount of information held on the database and the uses made of that information will increase dramatically.
- The Government's poor record on IT projects make this a huge financial risk.

We do not accept that ID cards will have any particular benefit

- Arguments that they will protect the UK from terrorist attack are unconvincing. The men responsible for the 9/11 and Madrid terrorist attacks had valid identification.
- They will not help fight crime but will be counterproductive, as they will deflect financial and policing resources away from crime prevention and detection.
- They will have minimal impact on benefit fraud, as this is usually about financial circumstances rather than identity.
- Most identity fraud takes place remotely, online, over the phone or using false 'seed' documents (driving licences, passports and so on). Identity cards will not address this.
- They will have no impact on illegal immigration as asylum seekers have been required to carry ID cards since 2000.

The Identity Cards Bill is flawed

- Too much detail is retained for regulation.
- ‘Safeguards’ protecting against the need to carry cards fall away when the cards become compulsory.
- Criminal and civil penalties are excessive.
- There is no auditing process to ensure information is accurate.
- Information sharing powers are too broad.
- The Identity Card Commissioner has insufficient power.

Introduction

1. The re-introduction of the Identity Card Bill means that debate over this proposal, originally made in 2002, is continuing for well over three years. A huge amount of parliamentary time in both Houses and in various Committees as well as massive Home Office resource has been devoted to the scheme. Other than being changed from a voluntary ‘entitlement’ card to a compulsory identity card, little concession has been made despite dwindling support and growing opposition. Even if the Bill is passed, a combination of years of planned implementation, uncertainty over technology and the likelihood of ever increasing costs means that there is no certainty that we will ever have a compulsory national scheme. Parliamentarians have an opportunity to defeat the Bill or ensure that further legislation is required before any move to compulsion. We urge them to take it.

2. The Identity Cards Bill is of constitutional importance and will permanently alter the relationship between the individual and the state. Liberty has profound concerns about the desirability, effectiveness and social and economic cost of identity cards. This is not to say that no national identification scheme could ever theoretically be justified. It would be difficult to maintain a position that refused to accept that there were circumstances where the state could legitimately create a compulsory national identity register. However, any project which has huge financial and constitutional implications needs to be justified. Such justification relies on the Government’s ability to establish a pressing social need that cannot be addressed by

less intrusive or expensive means. An identity scheme could only be justified if it were a proportionate response to that social need. We believe that the Government's plans do not pay sufficient regard to fundamental concerns and will fail to deliver most of the purported benefits. Before analysing the Bill we will consider our broader concerns and the benefits that the Government has suggested will result from the scheme.

3. It is a peculiarity of the identity card debate that those who express concerns have been required to justify their opposition rather than requiring the Government to justify their introduction. Popular support for identity cards has been cited as reason enough. However, evidence does not support this claim. The commonly used figure of 80% support was based on proposals for a voluntary identity card. Polls that factor in financial implications of the scheme show greatly diminished enthusiasm. A new ICM survey commissioned by No2ID released in June 2005 shows that the number of voters backing the move has slumped from more than 80 per cent to 55 per cent in six months. The number of opponents has more than doubled to 43 per cent. Support fell when the public were reminded that the cost of a combined passport and ID card could be £93. Similarly, support falls when people realise the lack of evidence behind claims that identity cards will help tackle terrorism, crime and illegal immigration. The experience of plans for identity cards in Australia shows that public support melted away once the public realised how much they would cost and how little they would benefit.

4. Liberty's concerns are broadly cost, privacy, constitutional, discrimination and 'function creep'. While each of these does not present an absolute objection, the cumulative effect severely undermines arguments for desirability and efficacy. When the supposed benefits are scrutinised and shown to lack credibility (see later), they become damning.

Cost

5. The Labour Government's first proposal¹ was costed at somewhere between £1,318 million and £3,145 million. For the cheapest option this would come to

¹ 'Identity Cards and Benefit Fraud' Home Office Consultation July 2002

approximately £5-15 per card. When the Consultation paper on compulsory cards was issued in April 2004 the ID card was expected to cost £35 on its own, or £77 in conjunction with a passport. The regulatory impact assessment on the Bill when published in late 2004 put the combined cost of passport and ID card at £85. When the Bill was republished after the election, this figure had risen to £93. This still falls far short of the cost estimate made by a recent LSE study² indicating the true cost to be between £12 billion and £18 billion. In August 2004 the Department of Health admitted the cost of a computerised records system in the NHS would not be £6.2 billion as originally claimed, but more likely between £18.6 billion and £31 billion. The final cost of identity cards may well render this a conservative underestimation.

Privacy

6. Discussion on the Government's plans has focussed on identity cards. This is slightly misleading as the fundamental purpose of the Bill is to establish a database (the National Identity Register or NIR). Identity cards will be a by-product of an entry on the Register, which will contain information about every person in the UK, and be accessible by a wide range of public bodies. This raises serious concerns about privacy. To say 'if you have nothing to hide, you have nothing to fear' is to mistake the crucial difference between hiding criminality and respecting privacy. Unwillingness to share information about ourselves does not imply criminal behaviour, but simply a desire for privacy. We are concerned that the Identity Card Bill, along with other recent measures³, represents a fundamental shift in the state's attitude to individual privacy. We are moving away from a position where information is not shared unless necessary, towards one where it will be shared unless there is a reason not to.

Constitutional

7. No other common law country in the world has an identity card scheme⁴. A common law country is one where an individual's actions are lawful unless positively prohibited by law and where the courts are responsible for interpreting law. This contrasts with civil law countries (most European countries) which have codified legal systems. This is not in itself an argument against identity cards. However, it is

² The Identity Project: an assessment of the UK identity Cards Bill June 2005

³ Such as the establishment of a database containing information on all children in the Children Act 2004

⁴ With the possible exception of Cyprus which the Home Office argues is a common law jurisdiction

worth noting that all civil law countries have written constitutions and nearly all have far stronger privacy laws than the UK, which act as a balance against state intrusion into individual privacy.

Discrimination

8. Identity cards will have particular consequences for race relations. We are concerned by the disproportionate use of stop and search against ethnic minority groups. This has been particularly apparent in the disproportionate use of stop and search powers without reasonable suspicion against British Muslims⁵ and of stop and search powers under the Police and Criminal Evidence 1984 (PACE). In 2003/2004, 14 per 1,000 of the White population were subject to stop and searches as compared to 93 per 1,000 of the Black population and 29 per 1,000 of the Asian population. Claims that a lack of an explicit power for the police to demand to see identity cards provides protection do not stand up to examination. Firstly, as explained later, the prohibition on requiring the production of cards in Clause 18 falls away once you have been compelled to carry one under Clause 6. As we will all eventually be compelled, this means we will all eventually be required to produce cards when requested to do so. In any case, as the police have broad powers of arrest under S.25 PACE, particularly if considered necessary to establish identity. Whether the police have a specific power or not, people are likely to produce a card in order to avoid arrest. Cards will also frequently have to be produced to access services. This is likely to predominantly affect ethnic minorities⁶.

9. Our concerns are exacerbated by the Government's argument that identity cards will be an effective tool of immigration control. There have been widespread reports that immigration officials frequently apprehend people on public transport. In September 2004, The Guardian ran a story⁷ claiming that in the previous 15 months, 235 operations had been conducted adding "The figures showed that those arrested included 717 failed asylum seekers but thousands more people have been stopped and questioned by immigration staff using powers which the police are banned from using." Comments by immigration minister, Des Browne, were telling. He said that officials could legitimately question people to determine their immigration status

⁵ As permitted by S.44 of the Terrorism Act 2000

⁶ As they are more likely to be compelled under Clause 6. See paragraph 32.

⁷ Guardian, 15 September 2004 '1,000 illegal migrants arrested in swoops' Alan Travis

where there is a reasonable suspicion that a person is an immigration offender. Given that Clause 1 (5) (e) of the Bill allows ‘current residential’ status as a registrable fact, it is inevitable that members of minority ethnic communities will regularly be required to produce their identity card on demand by immigration officials.

Accuracy

10. Many of our concerns about the accuracy of the system stem from successive governments’ appalling record on databases. Databases set up for the Passport Agency, the Census and the Criminal Record Bureau all show embarrassing levels of inaccuracy and expense. The most recent examples of failure include those of the Child Support Agency computer and the national fingerprint identification system. Such levels of inefficiency and error are unacceptable and will undermine public confidence in the likelihood of personal information being kept safe and secure. It is also worth noting that when errors are made by the Criminal Records Bureau, these can be identified when an application is made for a Criminal Record Certificate. There is no auditing process in the Identity Cards Bill which would allow people to check and correct their entry. There are substantial concerns about the effectiveness of biometrics. We do not wish to replicate the findings of the excellent LSE report, which goes into detail on this subject, but would urge parliamentarians to read it.

‘Function Creep’

11. Liberty is deeply concerned about the inevitable increase in types of information collected and stored on the register, and the potential for ‘function creep’. In 1950 a Parliamentary Committee looked at the use of the existing identity card and discovered that the original three purposes (conscription, rationing and national security) had mushroomed to 39 different functions. We can assume that whatever the initial proposal, this system would experience similar expansion of function and that the information held on the database will increase. It is worth noting that one of the first acts of the Conservative government in 1952 was to abolish the scheme. It was described by Winston Churchill as ‘no longer necessary’ and abolition would ‘free the people’.

12. The proposed system will result in what the Information Commissioner Richard Thomas, when giving evidence to the Home Affairs Select Committee,

described as a *'very significant sea change in the relationship between the state and every individual in this country'*. A wide range of interest groups, including those representing minority racial groups, the homeless, and those with mental health problems, have expressed concern at the implications of the scheme. We share these concerns that vulnerable groups may be adversely affected. We imagine that organisations representing these interest groups will focus on these concerns, so do not propose to go into further detail.

13. Before considering some of the arguments that have been put forward in order to justify the scheme, there is one particular issue which the Government has failed to address that should be mentioned briefly. This is the problem of the Common Travel Area between the UK and the Republic of Ireland, as succinctly summarised by the Labour MP Andrew Mackinlay in the House of Commons on 17 May 2005:

'We have not been told, however, how the Government will deal with people who commute from the Irish Republic to the United Kingdom. We have a common land border, and many people also commute from the Irish Republic to London on Mondays and go home at weekends. Once identity card legislation is in force, everyone will have either an identity card or a passport in London—except for people from the Irish Republic.'

An answer to this question is imperative.

14. An identity scheme could theoretically be justified if the threat tackled and benefits gained were so substantial that social and financial costs were outweighed. However, apart from assisting access to public services, none of the supposed benefits that we have been told cards will bring stand up to any degree of scrutiny. There is little evidence to support the Government's assertion that the scheme will help tackle terrorism, crime, benefit fraud and illegal immigration.

15. In July 2002 the then Home Secretary David Blunkett said 'I accept that it is important that we do not pretend that an entitlement card (as it was then known) would be an overwhelming factor in combating international terrorism'⁸. However,

⁸ Hansard, 3 July 2002

combating terrorism is still used as justification for the card. It is a sad truth that a compulsory ID scheme in Spain did not prevent attack there. Given that a sophisticated terrorist network is likely to recruit those with no criminal convictions or history with the authorities it is difficult to see how the introduction of an identity card will have any real impact. It is safe to assume that British intelligence agencies have gathered information on anyone that they believe could constitute a risk to national security. We cannot imagine what information held on a massive identity register would add to that possessed by the Security Services. For the vast majority of people who are not involved in terrorist activity, their entry is irrelevant in combating terrorism. Even if there were evidence that identity cards could help combat terrorism full compulsion is not expected for nearly ten years. Until then it will be ineffective as a terrorist is unlikely to volunteer to register.

16. Another justification for the scheme is that it will help beat crime. The Police Service seems undecided. Written evidence to the Home Affairs Select Committee said ‘We have seen no evidence either here or in previous debates, that suggests the introduction of an identity card will in itself lead to a reduction in crime or an increase in detection rates’⁹. However, as there is still a perception that the card and NIR will fight crime, this justification needs to be addressed. Identity is rarely an issue in criminal cases. The vast majority of crimes never lead to arrest. This is nothing to do with identity but simply down to policing resources. Even when there is a suspect, the issue is rarely identity but whether sufficient evidence of culpability can be obtained. As it will not be compulsory to carry a card we imagine that anyone asked by the police to confirm their identity will be given a number of days to go to a police station and do this. Law abiding citizens will do this at inconvenience to themselves and at cost to police resources. If it were to become compulsory to carry a card then much police time will be wasted dealing with innocent people who forget to carry them. If money is to be spent on fighting crime we would prefer to see it being targeted at providing adequate policing resources.

17. Equally, there is no evidence to support the claim that an identity scheme will address the problem of benefit fraud. The Government’s figures show that around five

⁹ Memorandum of Metropolitan Police Service. Home Affairs Committee Evidence Volume 2 page 239

per cent of fraud relates to identity. The vast majority of cases of benefit fraud involve lying about circumstance by, for example, claiming state benefit and working cash in hand.

18. One of the most often cited social problems to be tackled by the identity card scheme is illegal immigration but, again, there is little to back this up. Those seeking asylum have been required to carry identity cards since 2000. Employers are required to inform the authorities if they suspect the immigration status of workers, but unfortunately they rarely do. The tragic events in Morecambe Bay demonstrated not only that people are being exploited, but also that the immigration services would not have to look hard if they wished to pick up significant numbers of illegal workers.

19. The most recent argument put forward for the Bill is that it will help fight identity theft. As it is now over three years since the Government first proposed ID cards it is not surprising it has felt the need for a new justification, as the others have not fared particularly well. According to the Government identity theft costs the UK £1.3 billion a year. If ID cards were able to prevent this it would be a major boost for the scheme but, again, the claims do not stand much scrutiny.

20. To begin with, the figure of £1.3 billion is in itself a fraud. It was obtained by adding the figure for overall plastic card fraud to a range of other figures including false insurance claims and costs associated with dealing with immigrants arriving in the UK with false documents. In reality, most identity fraud is done remotely, either over the telephone or online. Identity cards would not assist. Recent attempts by Banks and Building Societies to improve security¹⁰ may go some way to preventing fraud. Improved security by financial providers will make a difference, ID cards will not. In reality, for ID cards to tackle identity fraud, all businesses (banks, shops and so on) would need biometric scanners and access to the database for verification purposes. This is extremely cost prohibitive and unlikely. However, without this, businesses will need to take documents at face value, undermining the whole point of the scheme.

¹⁰ Though the introduction of CHIP and PIN for example

21. An ID card could make the problem of identity fraud worse. Whatever form the card takes, impressive forgeries will not take long to appear. Genuine cards will be fraudulently obtained through fake ‘seed’ documents. There are 46 member states just within the Council of Europe and it will be extremely difficult for the authorities to identify false documents from those countries. It is not difficult to imagine a thriving market in properly obtained fake identity cards in the coming years; there is a precedent. In 1947, the House of Commons were informed that 20,000 deserters from the armed forces had acquired false identity documents¹¹. As the technology used to devise the cards has advanced, so have forgery techniques.

22. The one benefit the identity card scheme could bring is improved access to services. However, this benefit could be provided by specific identifiers such as an NHS card. Improved access to services does not justify either the vast expense or the personal intrusion that will result from this scheme and, in particular, the use of compulsion.

23. Liberty’s objection to the Bill is based on the failure of the Government to demonstrate that the introduction of the identity card scheme is a proportionate response to an identified social need. We have not been alone in voicing this concern. In its report on the identity card proposals, the all-party Parliamentary Home Affairs Committee said, “[T]he Government’s proposals are poorly thought out in key respects: in relation to the card itself, to procurement and to the relationship of the proposals to other aspects of government, including the provision of public services”¹². The problems in earlier proposals have not been addressed, and the onus remains with the Government to justify why identity cards are needed.

¹¹ Extract of speech in the House of Commons by WS Morrison MP in 1947, “*We were told in the House the other day that there are 20,000 deserters still at large. How have these 20,000 persons contrived to equip themselves with food and clothing? Ex hypothesi they cannot be possessed of valid honest identity cards, but that has not prevented them from sustaining themselves with food and clothing themselves with raiment without these documents. Therefore, as a deterrent to the evasion of the rationing arrangements the case is proved that they are of little or, at the best, of speculative value*”

¹² Home Affairs Committee report on ID cards July 2004 HC130 at Paragraph 219

General Comments on the Bill

24. The new version of the Bill is very similar to the previous and the changes are cosmetic. No substantive concessions have been made. The Bill is described as ‘enabling’ legislation. This means that the framework of powers is set out in the Bill with a view to phasing in registration and the issuing of cards over a number of years. During passage of the previous bill the Home Office admitted that the Bill *‘does not set out the detail of how the scheme will work in practice as it is too early in the development of the scheme for decisions to have been made on this’*. Consequently, much of the detail about the process determining who will have to carry a card; who will have access to information; and how information may be passed on, is not included in the Bill. These key details have been reserved by the Home Secretary for secondary legislation. While it is inevitable that legislation creating a new scheme allows for some future and more detailed provision it is constitutionally unacceptable that so many fundamental aspects of the scheme will not be subject to full scrutiny by Parliament. The Bill makes repeated reference to the need for affirmative resolution by both Houses of Parliament to extend any provisions in the Bill relating to compulsion, information recorded and sharing and so on. While this provides some check to the Government’s ability to extend the provisions in the Bill, the affirmative resolution procedure is a blunt tool for legislative scrutiny, as it does not allow amendment of a proposed regulation. To take an example: a regulation that proposes extending the data sharing ability to a wide range of public bodies will either stand or fall as a whole. Parliamentarians may agree with some, but not all, aspects of proposed regulation, but they will be unable to amend it. To enable full legislative scrutiny and parliamentary debate the power to amend regulations should be written onto the face of the Bill, whenever regulations deal with categories of persons or bodies.¹³

25. The Home Secretary has stated that compulsion will not occur until a number of criteria have been satisfied. This is not envisaged for several years. Compulsion is expected to become universal in 2013. However, there is nothing in the Bill to prevent

¹³ As in (Clause 7 (2) (c)) which creates an ability to amend when extending compulsion. The problem with regulation approval was apparent in the recent orders made under the Regulation of Investigatory Powers Act 2000 where list of bodies to be given access powers to communications data, for example, had to be approved or rejected as a bloc.

immediate compulsion. Clause 7 requires compulsion to be approved by Parliament and lays down a number of requirements, but the timeframe envisaged appears to be dictated by logistical factors and can, presumably, be brought forward. Such a huge project inevitably requires a long implementation period. If a week is a long time in politics it is perhaps slightly presumptuous of any Government spending billions of pounds of taxpayer's money to state its intentions nearly ten years hence. A transport project might justify this as they are generally not politically contentious. Such a controversial constitutional measure as this, which does not enjoy universal political support, does not. This is compounded by the fact that many of the benefits we are told ID cards will bring, such as protection from terrorism, cannot mature until cards become compulsory.

26. As explained earlier, although the Bill is called the 'Identity Card Bill' its primary purpose (and the subject of the bulk of clauses) is to create a National Identity Register. An identity card itself is a consequence of entry onto the Register. Provisions about data sharing powers and the level of detail recorded relate to the Register. This underlines the distinction between the previous wartime national identity scheme and the current proposal which is much more intrusive. It also means that the identity card itself is less relevant to the debate. All provisions relating to identity cards could effectively be removed from the Bill without undermining the principal purpose.

The Bill

27. Clause 1 creates the National Identity Register. Information that can be held is limited to the definition of 'registrable facts' contained in Clause 1(5). The explanatory notes to the Draft Bill published last year stated that registrable facts could not be extended by regulation to cover categories not relating to identification, such as criminal convictions or medical records. No mention is made of this in the Bill itself (or in its explanatory notes) although we imagine that during debate in Parliament the same assertion will be made. We are not convinced that non-identification material will be excluded. The list of 'registrable facts' includes at 1(5) (g), 'information about numbers allocated to him for identification purposes and about the documents to which they relate'. As identification numbers of the Police National

Computer and National DNA database, for example, are used to establish links to identifying information they could arguably be included. Similarly, we do not see how the categorisation of ‘residential status previously held by him’ as a registrable fact (Clause 1(5) (f)) is relevant as an identifier. We wonder how information about someone’s past residential or immigration status could be regarded as limited to ‘identifying information’.

28. Even if such information could not be added by regulation it is misleading to imply some sort of bar preventing addition to the list by subsequent primary legislation. We have recently seen provisions for data retention contained in anti-terrorism legislation¹⁴ and powers relating to detention of terrorism suspects contained in an asylum act¹⁵. It is easy to envisage extension proposals arising in a future criminal justice bill. During the investigation into the Soham murders, the Bichard Inquiry looked into ways of ensuring that those who were unsuitable were not able to work with children or vulnerable people. Liberty agrees with Sir Michael Bichard’s recommendation, that there be a positive vetting process and a register of those suitable to work with children. However, had an identity card been in place at the time it is likely that there would have been suggestions for ‘soft’ non-conviction information to be held on the Register. We make this point not to consider the desirability of doing this, but to demonstrate how once a card is in place it is inevitable that uses develop beyond the initial parameters. Similarly, if there were a terrorist attack on mainland Britain it is likely that there would be consequent pressure to greatly increase the information held on the card to include information such as criminal convictions. As mentioned before, the experience with the wartime identity card demonstrates how, once established, the use of the card is likely to proliferate. We would urge Parliamentarians to bear in mind how the list of information is likely to increase once the Register is in place. The list of what constitutes ‘in the public interest’ allowing facts to be registered (Clause 1(4)) would not provide much limitation on what information could be added. National security, crime, immigration, employment and the provision of services covers most facts that could realistically be recorded.

¹⁴ The Anti Terrorism Crime and Security Act 2001

¹⁵ Asylum and Immigration (Treatment of Claimants etc) Act 2004

29. Clause 2 determines who will be placed on the Register. This will be anyone in the UK aged 16 or over and anyone of a category determined by the Secretary of State. This age can be modified by order to allow children to be registered by virtue of Clause 2(6). A minor concession has been put in here in that the age cannot not be changed unless a draft of the order has been laid before each House and approved. The Clause differs from that contained in the Draft Bill in that there is a new Clause 2(3)(c) which creates a new category of those who may be excluded from entry on the Register to include people ‘residing in the United Kingdom despite having no entitlement to remain there’. It is clear from the explanatory notes that this is intended to relate to asylum seekers. As we understood from earlier Government comments and consultation that asylum seekers were intended to be one of the first groups subjected to compulsion under Clause 6. We presume this amendment relates to restriction of benefit entitlement.

30. The information that is to be included on the Register is determined by Clause 3 and Schedule 1. This will include personal information, a biometric identifier and historical information including the history of access to the register itself. Much has been made of the limited nature of information that will be held. It is worth making the point again that all that is needed to expand on this data is an order by the Home Secretary.¹⁶

31. Although the registration scheme is presented as being, at least initially, voluntary, the impact of Clause 5 is that in many cases it will not be. Clause 5(2) requires that an application for any ‘designated’ document must be accompanied by an application for entry onto the register. We imagine designated documents will include passports and driving licences. However, as Clause 4 allows the Secretary of State to determine by regulation exactly which documents will be designated, there is every chance that this will be an extensive list to ensure compulsion at an early stage. This is not exactly disingenuous, the Government having clearly stated its intention to introduce a compulsory card. However, it means that many of those who do not intend to apply for a card while it is still in the ‘voluntary’ stage will find it themselves effectively ‘forced’ to apply.

¹⁶ Although any extension must still must still come within the definition of ‘registrable fact’ in Clause 1 (5)

32. Liberty has grave concerns about the twin track voluntary and compulsory system that will be set up through the selective compellability powers granted to the Secretary of State under Clause 6. It is likely that the Home Office intends that non-EU nationals will be compelled before British nationals: this is clear from the document that accompanied the Home Secretary's launch of the national identity cards scheme in November 2003, 'Identity Cards: The Next Steps'.¹⁷ This raises race relations issues. Decisions whether production of a card is necessary (Clause 18) will be based on whether someone has been compelled to register under Clause 6. Therefore those who look foreign, in particular those who are not White, will be asked. A potential discrimination point also arises if the Home Secretary phases in compulsory registration for UK nationals according to age.¹⁸ There are logical reasons why the Government would wish to do this. For example, there may be evidence that people above a certain age might be more resistant to voluntary registration. Similarly, they may be less likely to be 'forced' to register by applying for a driving licence or passport.¹⁹ However, this does mean that during the phasing in process people of certain ages will be subject to requirements and penalties not applicable to others.

33. Use of the compulsion power in Clause 6 carries a greater burden on those compelled than simply the prospect of a £2,500 fine imposed by Clause 6(4) (repeated on each occasion on which notice to register is not complied with). Those compelled to register will also be subject to the fine of £1,000 for failing to renew their identity card on time (Clause 9). Similarly, requirements that free public services cannot be conditional upon evidence of registration (Clause 15) and the bar on required production of identity cards (Clause 18) does not apply to those compelled under Clause 6. Initial distinctions between bodies of people could be converted, through Clause 6, to a permanent twin-track system. It follows, for example, that those who

¹⁷ Cm 6020. At page 5 it is stated that the government will introduce "*mandatory* biometric identity documents for foreign nationals coming to stay in the UK for longer than 3 months" (Liberty's emphasis) during Stage 1 of the scheme's roll-out, while the cards will remain voluntary for UK nationals. The document also suggests that EU nationals will be included during Stage 1, but this is an impossibility under EU law.

¹⁸ As has been envisaged. See paragraph 2.54 of the consultation document accompanying the Draft Bill

¹⁹ And therefore be compelled to register under clause 4

are compelled to register simply on the basis of their age will be permanently subject to the far harsher regime as a consequence of that compulsion. Similarly, were non-UK, non-EEA nationals or asylum seekers to be compelled to register they would remain permanently subject to this harsher regime, even if they subsequently become UK nationals. This is an arbitrary and discriminatory approach and one we believe would be open to challenge under the Human Rights Act 1998 (HRA).

34. While the Bill allows for a possible permanent twin-track system it is clear the Government is proposing eventual extension of compulsion under Clause 6 to all categories of people. The Document ‘Legislation on Identity Cards: A Consultation’ expressly anticipated this. It suggested that compulsion could be rolled out by *‘[requiring] all people within a particular age band to register and to set a clear timetable for doing so’*.²⁰ This means that the group of people who benefit from the safeguards against refusal of public services and requiring production of cards set out in Clauses 15 and 18 will be ever-dwindling, and probably eventually non-existent. Similarly, the requirement in Clause 9 of forced attendance (otherwise receiving a £1000 fine) to be photographed and have biometric information taken in order to obtain or renew an identity card will eventually apply to everyone.

35. Once compellability becomes universal²¹ all people living for over three months (or other period determined by the Home Secretary) in the UK will need to produce their cards upon request, and will need their cards for access to public services. Everyone will face harsh penalties for failing to register and renew on time. When there is debate about ‘safeguards’ during the process of the Bill it is vital that parliamentarians appreciate that these are likely to only be temporary.

36. The consultation paper accompanying the Draft Bill was at pains to stress that the £2,500 fine is a civil, rather than criminal, penalty.²² However, for the purposes of Article 6 of the HRA (the right to a fair trial) the penalty might be considered criminal

²⁰ Paragraph 2.54 of the consultation document.

²¹ That is when everyone, whether they have volunteered for registration or been forced to register through e.g. passport application also comes under clause 6 by virtue of age compulsion (if that is the method used)

²² See paragraph 2.55 and 2.56 of the consultation Document

rather than civil regardless of the label attached by the Government. European Court of Human Rights jurisprudence has established that,

'for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as 'criminal' from the point of view of the Convention, or that the offence made the person liable to a sanction, which, by its nature and degree of severity, belongs in general to the 'criminal' sphere'.²³

It is worth remembering that Clause 6 will apply not only to the person who absolutely refuses to have an identity card but to anyone who does not take the chance to apply when the opportunity of applying voluntarily is available.²⁴ Clause 6 may also apply to individuals who have already volunteered but fall into a designated class, for example, on the grounds of age or status. We believe that the Government should reconsider the introduction of such a harsh and arbitrary penalty system for all those compelled under Clause 6 (a category which may eventually cover all individuals within the UK).

37. If the Home Secretary requires it, those required to be issued with identity cards can include anyone entering the UK. Under Clause 8 (5) a card may be issued to anyone not normally required to carry a card but about whom prescribed registrable facts have been entered on the Register. These facts, such as name, address and so on, will be required from all those passing through customs. Under Clause 2 (2) all those of a prescribed description proposing to enter the UK are entitled to be entered on the Register. The consequence is that the Secretary of State may pass regulations requiring non-nationals who are not applying for immigration or refugee status to have identity cards.

38. Clauses 11-13 relate to maintaining the accuracy of the Register. This is largely achieved through obligations on individuals to notify of changes in relevant information. It does not, however, create any obligation to audit the information contained on the Register. The Government has a poor record on accuracy of information held on databases, demonstrated most recently by the Criminal Records

²³ *Ezeh & Connors v UK* (Application Numbers 39665/98 and 40086/98)

²⁴ If indeed there ever is one. There is nothing in the bill to stop immediate compellability for whoever the Home Secretary feels should be made to carry a card immediately.

Bureau, which was shown to hold numerous inaccurate details of convictions. Whilst inaccurate information in the CRB can be discovered through the issuing of a Criminal Conviction Certificate, inaccuracies on the National Identity Register could remain undetected indefinitely. In addition to the obligations on individuals, Liberty believes a duty to ensure entries are accurate should be written onto the face on the Bill. This could be achieved by requiring details of the entry to be sent to those on the Register on an annual or bi-annual basis. While we maintain our opposition to the creation of a National Identity Register, if there is to be one it should be as accurate as possible. Self-verification is the best way to ensure this.

39. Clause 12 places an obligation upon all those on the Register to inform the Secretary of State of any relevant change of circumstance affecting an entry on the register. A failure to do so can result in a fine of £1,000. Whilst some details will remain relatively static, others, such as address, can change quite frequently. This could place a considerable burden on those who live in insecure, or simply frequently changing, accommodation. Those who change address frequently are often the poorest in society. As the Secretary of State can also require a fee to be paid for any modification to an entry on the Register (Clause 37 (1)) the potential cost of the identity card to those who move house frequently (and who may be least able to afford such cost) is considerable.

40. When the Bill was originally published we were extremely concerned that there were a range of criminal offences relating to cards that were lost, stolen damaged and so on. We stated that the criminal law should only be used for acts of commission (such as fraud) rather than acts of omission. We are pleased to see that the new Bill now makes these civil rather than criminal penalties.

41. Clause 15 ensures that provision of free public services (such as NHS treatment) cannot be conditional upon evidence of registration.²⁵ Similarly Clause 18 creates a prohibition on a requirement to produce identity cards. However, both Clauses contain exemptions (i.e. allowing refusal of services or requiring production of a card) where a person has been compelled under Clause 6. We imagine this is

²⁵ Although regulations can be made requiring evidence of registration for general provision of public services.

primarily intended to ensure certain groups, such as foreign nationals, be required to carry a card. As explained earlier, these ‘safeguards’ are only likely to be temporary as when the compulsory scheme is extended they will no longer be relevant.

42. There will be a number of consequences of the two tier scheme that will exist until final national compulsion takes place. UK citizens who are compelled because they haven’t registered by the date when the Home Secretary determines that cards shall become compulsory for them²⁶ can be required to produce cards while other citizens are not. We do not imagine that the Government intends to impose this two-tier system on British citizens. We believe the Bill should ensure that British citizens would not be required to produce a card, or need one to access services, until *all* compulsion has occurred. Otherwise the impact will be discriminatory, as only people required to register by virtue of a factor such as their age will need to carry their cards.

43. We are concerned about the implications for public service employees who will make decisions about whether a person can be required to produce a card or whether services can be legitimately refused. They will effectively be policing the identity register. They will also face potential legal action against their employer if they make an incorrect judgment about a requirement to produce a card as Clause 18 (3) creates a specific duty not to impose an improper condition remediable by injunction or financial relief. We have spoken to Trade Union representatives who are extremely concerned about the obligations and duties this will place upon their members.

44. Central to the Bill are the information sharing powers which allow access to the Register. We believe that there is excessive scope for information to be passed on without adequate accountability. For example, the Home Secretary reserves the power to make regulations authorising disclosure of information on the Register, without consent, to the police that go beyond national security or crime detection and

²⁶ By being in an age group the Home Secretary has determined shall be subject to compulsion for example.

prevention.²⁷ We appreciate that such an order will have to be approved by Parliament but, as mentioned earlier, remain concerned that this does not allow a sufficient level of scrutiny. This means that the Home Secretary will allow the police access to information for potentially unlimited purposes. Exhaustive lists of purposes appropriate to the legitimate accessing and sharing of information are frequently contained in legislation.²⁸ It is far preferable that the purposes be written onto this Bill to allow certainty and proper debate.

45. Power to disclose without consent is further extended, theoretically without limit, in Clause 22. Regardless of the fact that approval is required for regulation we remain extremely concerned that the Home Secretary has effectively written himself a blank cheque. We find it difficult to imagine a situation where disclosure of information on the Register under Clause 22 could be justified. Clauses 19-21 are already extremely broad in scope and we wonder what extra powers of disclosure are envisaged. In particular, we wonder how likely it is that disclosure powers which go beyond those already contained in the Bill will not breach data protection requirements or fall foul of proportionality and legitimate purpose requirements contained in Article 8 of the HRA. The right to respect of privacy in Article 8 can only be breached for a specific purpose²⁹ and any breach must not be excessive for the purpose it serves. If the Government has further disclosure provisions in mind they should be written into the Bill to allow full Parliamentary debate as to whether these tests are satisfied.

46. While we do not accept the creation of the Register is justified we are pleased to see that a National Identity Scheme Commissioner will be appointed under Clause 24. In the Draft Bill the Commissioner was restricted to a single power, reviewing the use of powers of disclosure without consent.

²⁷ Clause 19 (3). Access records under Paragraph 9 can only be obtained if connected to the detection or prevention of serious crime.

²⁸ For example, in the Schedules to the Data Protection Act 1998, as legitimate purposes under Article 8 of the Human Rights Act 1998 or in section 22 of the Regulation of Investigatory Powers Act 2000.

²⁹ These are 'national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'

47. The Commissioner has a broader role than originally envisaged but is far from an independent, robust reviewer of the scheme's operation. The Commissioner's function is to keep under review the arrangements made by the Secretary of State and designated documents authorities, such as the UK Passport Service, for the exercise of their functions under the Act (if passed). The Commissioner will also review the uses to which identity cards are being put. This means that the Commissioner will only be able to review general structural issues and not individual complaints or cases, or how the scheme works in practice. The Commissioner is excluded from considering the imposition of fines, criminal offences related to identity cards, information provided to the Security Services, the Secret Intelligence Service or GCHQ. The Commissioner has no power to review the adequacy of his own role and powers.

48. We are concerned that the role is still very limited. The Commissioner is powerless in relation to the areas s/he does review and has no power to change anything s/he finds to be unsatisfactory. Under Clause 25 s/he must make annual reports to the Secretary of State³⁰. The Secretary of State must lay a copy of any report made by the Commissioner before Parliament but may edit or delete information for a wide range of reasons. He may remove information if it appears to him that publication would be prejudicial to national security, prevention or detection of crime, or the continued discharge of the functions of any public authority. As the Home Office and UK Passport Service are public authorities this means that any critical material in the Commissioner's report may be excluded as it would undermine them, thus undermining the very purpose of the Commissioner. The Secretary of State may also exclude any information that appears, to him, to be contrary to the public interest.

49. Liberty's view is that the Commissioner's role should be broader and powers stronger. In particular, s/he should report to Parliament directly as the Information Commissioner does. It is impossible to independently review the Secretary of State if reports to Parliament are filtered by him. Ideally the Commissioner's role should extend to overseeing the operation of the registration and identification scheme as a whole. If it is envisaged that the Secretary of State will make repeated extensions to

³⁰ In the Draft Bill reports were made to the Prime Minister but for some reason this has been downgraded in the Bill.

his powers through the passing of regulation it is important that the Commissioner is able to report on the use of such powers. This will allow Parliamentarians to assess whether further extensions are justified.

50. We have no comment on the range of offences relating to the possession of false identity documents or documents relating to others with the intent of using these to establish identity. However, we query whether the lesser offences of being in possession of identity documents that are false, improperly obtained or that relate to someone else, are entirely necessary. If the document has been improperly obtained it is likely that an offence will also have been committed under Clause 30 (providing false information). If the document belongs to someone else then we imagine an offence of handling stolen goods would have been committed. If the document has been found, but the person has not taken steps to return them to the owner (whether this would amount to a reasonable excuse is questionable) we do not think the criminal law is appropriate.

51. Clause 29 creates an offence of unauthorised disclosure of information. It is appropriate that adequate safeguards exist to ensure that those with access to the register are prevented from making unauthorised disclosures. However, the manner in which the Bill is drafted will also make ‘whistleblowing’ a criminal offence. It will be a criminal offence to disclose ‘confidential’ information to others without lawful authority, e.g. journalists or opposition politicians. Information learnt in the course of employment by individuals who have any responsibility for the establishment or maintenance of the Register, or the issuing, modification, cancellation or surrender of identity cards is deemed to be confidential. This means that anyone who releases information about the Register in the public interest will be criminalised. In order to prevent this, a specific public interest defence should be incorporated.

52. We have mentioned earlier that the consequential costs arising from the national identity scheme are likely to be considerable. Clause 37 envisages a wide range of situations, including issue, modification and application for disclosure, where fees may be charged. It is telling that the Home Secretary envisages the necessity of frequent charging to balance against the high costs of setting up and maintaining the Register. Any comments during debate on the Bill about how it will be ‘self

financing' should be considered in the light of what is likely to be an onerous charging policy.

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